Novi American, Inc. *and* United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Petitioner. Case 10–RC–14178

November 20, 1992

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 27, 1991, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 32 for and 57 against the Petitioner, with 11 challenged ballots and 1 void ballot, a number insufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief, and adopts the Regional Director's findings and recommendations only to the extent consistent with this decision.

The Employer has excepted to the Regional Director's finding that certain statements made by the Employer's president, Daniels, in his November 15, 1991 speech to employees warrant setting the election aside. We find merit in the Employer's exceptions.[1] In that speech, President Daniels made the following statement:

> What can the Union do to force the Company to give in to its demands? If the Company says ''No,'' the Union must either agree or put pressure on the Company. The only way a union can really pressure a privately held company like Novi is to call a *strike.*

President Daniels also stated in the same speech that ''striking employees can be replaced by permanent replacements, and may not have a job when the strike is over.''

The Regional Director found the Employer's statements concerning pressure tactics objectionable, noting, inter alia, that an employer may not lead employees to believe that they must strike to get concessions. Relying on the Board's decision in *Fred Wilkinson Associates*, 297 NLRB 737 (1990), the Regional Director further noted that President Daniels' statement ''is very similar to campaign literature which the Board found created an atmosphere of fear that interfered with employees' free choice.''

Contrary to the Regional Director, we find nothing objectionable in the Employer's statement concerning pressure tactics. While we agree with the Regional Director that an employer engages in objectionable conduct when it leads employees to believe they must strike in order to obtain any concessions, we do not find that Daniels' statement, considered in the context of the November 15 speech, communicated this message to employees. The theme of Daniels' speech was collective bargaining. He began his speech by explaining to employees that if the Union won, the Company would be required to bargain in good faith and ''would do this,'' and throughout the speech he emphasized that the Company would bargain in good faith, thereby implying that the Company would endeavor to reach agreement through bargaining.

Although Daniels assured employees that the Company would bargain in good faith, he did not guarantee that the Company would always accede to union demands. Daniels frankly acknowledged that the Company might say ''No,'' and, if it did, that the Union could ''either agree or put pressure on the Company.'' The speech considered as a whole would not reasonably be construed as meaning that the Company would *always* reject union demands or that the Union would have to strike in order to get *anything*. Thus, in remarks preceding the reference to union pressure, Daniels had pointed out that the Company would bargain in good faith but that if the Company believed a union demand did ''not make good business sense,'' was something the Company could not ''afford'' or ''would hurt the Company,'' it had the right to say ''No.'' In sum, there was no threat to refuse to engage in good-faith bargaining over union demands.

Finally, we find that the Regional Director's reliance on the Board's decision in *Fred Wilkinson Associates*, supra, is misplaced. In that case, in which the Board found that the following statement in the employer's campaign literature created an atmosphere of fear and coercion, the employer had stated in a letter to employees that ''the [union] cannot guarantee that your wages and benefits will go up or even stay the same. The only thing [the union] can guarantee is a strike. In fact, the *only* thing [the union] can do to try to get the company to agree to its demands is to call a strike.'' (Emphasis added.) The Board, in finding objectionable conduct, concluded that the ''thrust'' of the employer's letter ''was to convince the employees of the inevitability of a strike as an effort to obtain concessions from the [e]mployer.'' By contrast, Daniels emphasized collective bargaining as the process through which union demands would be considered, promised to bargain in good faith, and expressly stated: ''I am not predicting a strike if the [U]nion is voted in. I don't know what will happen and I hope a strike will never happen because everyone loses in

[1] We note that the Employer in its exceptions further contends that the Regional Director erred in setting aside the election based on remarks made by the Employer in the November 15, 1991 speech because these remarks were not the subject of specific objections. In light of our decision to reverse the Regional Director's findings that such remarks were objectionable and to remand this case for a hearing on other issues, we find it unnecessary to pass on this exception.

a strike.'' Thus, in the context of the entire speech, Daniels' remark that ''[t]he only way a union can really pressure a privately-held company like Novi is to call a strike'' was not a prediction of strike inevitability and not objectionable.

The Regional Director also found the Employer's statement concerning permanent replacements objectionable, noting that at no point in the speech did the Employer distinguish between economic and unfair labor practice strikers and that the Employer thus implied that strikers have no reinstatement rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Relying on the Board's decision in *Emerson Electric Co.*, 287 NLRB 1065 (1988), the Regional Director concluded that the statement in the Employer's speech concerning permanent replacements ''would be deemed an unlawful threat of job loss if employees were to go out on strike.'' The Regional Director also relied, inter alia, on the Board's decision in *Fern Terrace Lodge*, 297 NLRB 8 (1989), for the proposition that an employer ''cannot go beyond the mere recitation of its right to replace employees.'' Contrary to the Regional Director, we find nothing objectionable in the Employer's statement concerning permanent replacements. It is well established that when employees engage in an economic strike, they may be permanently replaced. *Laidlaw Corp.*, supra.[2] In *Eagle Comtronics*, 263 NLRB 515 (1982), the Board held, inter alia, that comments by an employer that employees are subject to permanent replacement in the event of an economic strike do not constitute objectionable conduct. The Board in *Eagle Comtronics* explained that, ''an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*. . . . As long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act.'' 263 NLRB at 516.

Contrary to the Regional Director, Daniels' statement to employees was consistent with established Board precedent. Although the Regional Director found that the speech in its entirety failed to distinguish economic and noneconomic strikers, in fact, it is clear from the context of the speech that Daniels was contemplating an economic strike. The speech concerned collective bargaining and the economic consequences of unionization. In addition, the speech addressed wages and benefits and the economy. The reference to strikes occurred immediately subsequent to a discussion of what happens when the Company and the Union cannot agree on the Union's demands. Finally, Daniels emphasized throughout the speech that the Company would bargain in good faith, thereby negating any possible inference of an unfair labor practice strike.

Also contrary to the Regional Director, we find that Daniels' statement did not constitute an unlawful threat of job loss if the employees were to go out on strike. In this regard, the first portion of Daniels' statement, ''striking employees can be replaced by permanent replacements'' is consistent with the law and is not objectionable. *Care Inc., Colliersville*, 202 NLRB 1065, 1082 (1973), enfd. 496 F.2d 862 (6th Cir. 1974). Similarly, the second portion of the statement, that ''employees may not have a job when the strike is over,'' is also consistent with *Laidlaw* and thus not objectionable. Daniels was simply informing employees that when a strike ends, strikers may not have a job to which they can *immediately* return. By this statement, Daniels was addressing the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*. He did not threaten that, as a result of a strike, employees would be deprived of their rights in a manner inconsistent with those in *Laidlaw.*

Finally, we find the Regional Director's reliance on the Board's decisions in *Emerson Electric*, supra, and *Fern Terrace* misplaced. In this regard, we initially note that in *Emerson Electric*, in the context of an employee meeting where employees were asking questions concerning strikes, an employee asked if once the strike was settled, an employee could return to work, and the employer indicated that ''it did not have to take the employee back.'' This remark was held to constitute an unlawful threat of job loss. By contrast, here the Employer explained that *when* the strike was over, employees might not have a job. As noted above, the Employer was referring to whether an employee would have a job at the point in time when the strike ended. Unlike the employer in *Emerson Electric*, the Employer did not state that it might decide not to take the employee back. Similarly in *Fern Terrace*, where the Board held that the employer unlawfully implied a threat of job loss, the employer stated, in the context of a discussion with employees concerning permanent replacement of striking employees, that ''the replaced striker is not automatically entitled to his job back just because the strike ends.''[3] Unlike *Fern Terrace*, the statement at issue here did not even *suggest* that employees would automatically lose their right to employ-

[2] Economic strikers who are replaced may make unconditional offers to return and may be reinstated on making such offers if their positions or substantially equivalent positions are available. If reinstatement is not possible at such time, economic strikers have a right to be placed on a preferential hiring list upon such offers if positions are not available at the time of the offer. Id. at 1369–1370.

[3] Member Devaney notes he found it unnecessary to pass on this particular statement in *Fern Terrace.*

ment. Daniels' statement did not contain any hint of anything contrary to *Laidlaw*.[4] In light of the above findings, and contrary to the Regional Director, we find nothing objectionable in Daniels' statement concerning permanent replacements.[5]

[4] Consistent with the reasoning of *Eagle Comtronics*, Daniels did not threaten that, as a result of a strike, employees would be deprived of their rights in a manner inconsistent with the protections detailed in *Laidlaw*; Daniels was therefore free to address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*. Contrary to our dissenting colleague, our decision in this regard is fully consistent with the present law. It appears that it is the dissent which has problems with the current state of the law in this area.

[5] The Regional Director set forth another remark made by Daniels in his November 15 speech to employees and, while it is not completely clear, he arguably also found this remark objectionable. The Regional Director set forth the following remark by Daniels:

> There is still much to be done, but I must be truthful with you. Because of the Union campaign, our *hands are tied*. We can't do things even if we wanted to. The law prohibits me from making you any kind of promise of improvement, or [from] threaten[ing] to withhold some kind of improvement in order to get you to abandon the Union [emphasis in original].

After setting forth Daniels' remark, the Regional Director stated, inter alia:

> [G]eneral remarks which tie a withholding of benefits to Union activities have been found impermissible. *Centre Engineering, Inc*., 253 NLRB 419 (1980).

Assuming that the Regional Director also found the above-quoted remark objectionable, we reverse the Regional Director. Contrary to the Regional Director, we find that this remark did not tie a withholding of benefits to union activities but rather was merely an accurate recitation of Board law. In this regard, we find the Regional Director's reliance on the Board's decision in *Centre Engineering* misplaced. In that case, the Board found the respondent violated the Act when it stated that it could not implement a planned raise ''because their [sic] hands were tied.'' The Board found that this statement impressed on the employees that a raise would have been received but for the union campaign and further found that, in the absence of assurances that the raise would be given after the campaign ended or would be made retroactive, the statement violated Sec. 8(a)(1) by unlawfully attributing to the union its failure to grant a wage increase.

In contrast to our decision in *Centre Engineering*, here the Employer, in making the bare statement that its hands were tied, did not impress on employees that it was withholding wage increases or accrued benefits due to the union campaign. Instead, this portion of Daniels' speech was about the Employer not being free to make promises during the union campaign. Immediately prior to the above-quoted remarks, Daniels discussed current employee benefits and changes the Employer had made in recent months such as the establishment of a retirement plan and making ''several Management changes.'' Immediately following the above-quoted remarks, Daniels stated, inter alia,

> I believe in obeying the law, and nothing that I say or do should be looked at by anyone as a promise or a threat to get you to stay away from the [U]nion. While the [U]nion can promise you anything to get your vote, the Company cannot. . . . Unfortunately, this is one of the disadvantages that accompanies a union—tying up a company's hands and restricting a company lest its actions be viewed as a promise or a threat to deter the [U]nion.

In our view, the context of the above-quoted remarks establishes that these remarks constituted the Employer's explanation of the law. The Employer's statement—that the law prohibited it from making any kind of promise of improvement or threat to withhold some kind of improvement in order to persuade employees to abandon the Union—relates back and makes clear the meaning of the ''our hands are tied'' remark. As such, this portion of the Employer's November 15 speech was not objectionable.

ORDER

IT IS ORDERED that the proceeding be remanded to the Regional Director to schedule a hearing for the purpose of receiving evidence with respect to the allegations regarding the supervisory status of Ralph Phillips and the alleged threat to move the facility, to withhold a pay increase, to terminate all benefits, and begin all collective-bargaining from minimum wage and Objection 3.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a supplemental report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board. Within 14 days from the date of issuance of such report, either party may file with the Board in Washington D.C., an original and eight copies of exceptions. The party filing the same shall serve a copy on the other parties, and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER ORDERED that the proceeding is referred to the Regional Director for Region 10 for the purpose of arranging for the conduct of such hearing and that the Regional Director is authorized to issue timely notice of the hearing.

MEMBER OVIATT, dissenting.

I would affirm the Regional Director and set the election aside.

In my view the majority does not sufficiently accommodate the spirit of the law as expressed in *Eagle Comtronics*, 263 NLRB 515, 516 and fn. 8 (1982). Here the Employer stated, with little other explanation, that strikers ''can be replaced by permanent replacements, and may not have a job when the strike is over.'' There was no explanation of what happens to those replaced employees other than that their replacements could mean job losses.

My colleagues conclude that this statement does not amount to a threat of job loss because the Employer did not say that the job loss was immediate, but neither did the Employer say that it was not.

I find that it would only be reasonable for employees who are not knowledgeable in the sometimes arcane phraseology of labor law to conclude that this statement meant that if the Employer did replace them they would lose their jobs. This is precisely the implication the present law is aimed at preventing. Neither I nor any of the majority was on the Board when *Eagle Comtronics* was decided. If my colleagues in the majority are unhappy with the present law, we should work towards changing it—but not by changing the plain meaning of every day words.